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No. 90-6588
No. 90-1205

In The
Supreme Court of the United States
October Term, 1990

Jake Ayers, Jr., et al.,
Petitioners

TO BE REPRINTED

United States of America
Petitioners

v.

William Allain, Governor
State of Mississippi, et al.
Respondents

MOTION OF FORMER BLACK STUDENTS OF THE UNIVERSITY OF MISSISSIPPI FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS AND BRIEF

Willie J. Perkins, Sr.
301 E. Market Street
Greenwood, MS 38930
(601)455-1211
[Counsel of Record]

Gail P. Thompson
P.O. Box 1804
Oxford, MS 38655
(601)234-6103

MOTION OF FORMER BLACK STUDENTS OF THE UNIVERSITY OF MISSISSIPPI FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

The moving parties, 17 Afro-American students who formerly attended the University of Mississippi, move for leave to file the attached brief supporting the petitioners' requests for review of the decision of the Court of Appeals for the Fifth Circuit (en banc) in this case.

The private plaintiffs have consented to the filing of this brief. As of the final preparation of this brief, the United States and the respondents had yet to state positions.

The moving parties, six of whom testified at the 1987 trial in this case, desire to draw this Court's attention to evidence in the record showing that they and other Afro-American citizens attending the University of Mississippi have been the subject of extensive

harassment. This evidence demonstrates that Afro-American citizens have not had "real free choice" to attend the University of Mississippi, and, more generally, that the vestiges of discrimination persist at the state's first university.

The highly relevant material addressed in the attached brief has not been brought to this Court's attention by the petitioners. Therefore, amici's participation will be of assistance to the Court.

Respectfully submitted,

Willie J. Perkins, Sr.
301 E. Market Street
Greenwood, MS 38930
(601)455-1211
[Counsel of Record]

Gail P. Thompson
P.O. Box 1804
Oxford, MS 38655
(601)234-6103

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Interest of the Amici Curiae

The amici curiae are 17 former Afro-American students of the University of Mississippi, namely:

Veronica Anderson
Nancy Bailey
Stacy Bracy*
Charles Brewer
Mary Brown
Linda Campbell*
Don Cole
James Gilleylen*
Connie Greene
John Hawkins*
Thomasine Hill
Brenda Luckett
Albert Miller
George Neal
Lydia Spragin*
Gail P. Thompson
Ronnie Wiley

The amici's interest is to bring relevant matter in the trial record to this Court's attention in the hope that this will lead to this Court's granting review and, ultimately, requiring the elimination of racially discriminatory barriers at the university. An asterisk in the above list designates those persons who testified at the trial.

The amici are proud Afro-American citizens who chose the University of

Mississippi as the institution to further their studies. As the evidence summarized below demonstrates, they were confronted with a hostile and war-like environment that undermined their constitutional rights to education free of racial discrimination.

Amici, as with other alumni, have a continuing interest in the university which they attended. As alumni and members of the Afro-American community, amici seek to insure that their future contacts with the university, as well as those of Afro-American youth who choose to attend the University of Mississippi, are productive, peaceful, and dignified.

Reasons for Granting the Writs

Amici submit this memorandum to call to the Court's attention elements of the

record in which they have a special interest. In brief, this evidence -- of continuing harassment of Afro-American citizens enrolled at the University of Mississippi, and inadequate responses by the school -- demonstrates, as applied to that school, the patent falsity of the lower court's assertion "that all students have real freedom of choice to attend the college or university they wish...." Ayers v. Allain, 914 F.2d 676, 678 (5th Cir. 1990) (en banc). Moreover, the same evidence establishes that those Afro-Americans who do attend the University of Mississippi have been denied the peaceful atmosphere and dignified treatment which is their due.[1]

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[1] The following summary of the record also shows why amici are absolutely appalled that one reading the 41-page trial court opinion can not even determine that there was substantial testimony of harassment [see Ayers v. Allain, 674

Summary of Relevant Facts Concerning the University of Mississippi

Statistics admitted at the trial and testimony by two experts offered by the state provide a context for the evidence of harassment. We begin with the statistics.

In 1985-86, Afro-American students constituted 30.5% of all persons enrolled in Mississippi's eight universities. USX 880. In that year, the "first-time freshmen" enrollment of the University of Mississippi was only 4.7% Afro-American and total undergraduate enrollment included only 5.9% of this group. Id.[2]

F. Supp. 1523, 1558 (N.D. Miss. 1990)] and that the en banc majority "swept the problem under the rug." See Ayers v. Allain, 914 F.2d at 691 (reference, without any detail, to "racial incidents at the University of Mississippi").

[2] Of the other universities, Mississippi State University had the next smallest Afro-American enrollment, i.e., 13.4% "first-time freshmen" and 11.3%, all undergraduates. Id.

The evidence confirmed the obvious relationship between the level of minority enrollment at a university and the treatment of its minority students. Dr. John Millett, former chancellor of the Ohio Board of Regents, testified for the defendants. His cross-examination included the following exchange. (Tr. 3010):

> Q: Would you see harmony on the campus for black students who were at a historically white institution as important in terms of that institution's ability in the future to increase its percentage of black students?
>
> A: Yes.

The defendants' expert Dr. Bernard Siskin offered a more direct connection between the statistical evidence and the evidence of harassment. He compared the enrollments by race of the five historically white universities and what

he termed "the qualified pools." Tr. 4218-19. Siskin found statistically significant disparities between enrollment and the "qualified pools" for the University of Mississippi for both years of his analysis, and Mississippi State University for the last year. Tr. 4219, 4275. Siskin testified that

> [w]ith respect to the University of Mississippi, I would conclude that there is something in the process in blacks in the qualified pool being less likely to attend and showing up at the University of Mississippi than whites in the qualified pool. Tr. 4219.

Siskin agreed that black persons were "uncomfortable" about the University of Mississippi. Tr. 4307.

The trial evidence revealed that black students at the University of Mississippi faced anything but "harmony," as well as the precise reason for

"discomfort" about applying there. The following are examples of mistreatment drawn from the trial record.

James Gilleylen (undergraduate and graduate education spanning period from 1976 to 1983) testified about receiving an "F" on an English theme discussing his earlier educational experiences. He wrote that black youth received "the textbooks that the predominantly white schools had used previously, that were all worn out and outdated...." When Gilleylen inquired about his grade, his instructor explained that

> black people have an inherent problem in terms of their mastering the English language. You have problems in terms of being able to write and speak. Problems with the spoken language, as well as the written language. She told me that automatically I got a D when she read my topic, and that it went down hill from there.

Gilleylen had a similar experience with another instructor.[3] See Tr. 2659-64.

In a graduate program, a professor informed Gilleylen's class "[not] to place too much credence in the census data, because it was collected by a bunch of -- in his words -- 'unemployed illiterate black folk,' and then proceeded to tell [him], being the only black student in the class, that perhaps Mr. Gilleylen can further expand on that since he is much closer to the situation than the rest of us." Tr. 2679. The

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[3] "[French instructor] said that she could give [Gilleylen] very little direction because, one, we all understand that black people have problems with the English language, and therefore, it is not expected that we would be able to master a foreign language.

What she suggested to me, in her opinion, she said was her best suggestion is that I select a major that did not require a foreign language as a requirement and, therefore, I would not have to do any -- I would not have to deal with that sort of problem." Tr. 2664.

same professor at times greeted Gilleylen in the hall, privately, as he arrived for class: "...well, I guess we can start, the 'nigger' has arrived." Tr. 2681.[4]

Ms. Linda Campbell (1975-79) testified about a series of discriminatory practices by a professor, whom she identified. Black students were given less favorable clinical assignments and the more difficult elements of joint reports. The professor was "[a]t one point...either counseling black students to choose another major or enrolling them in the therapy because she said that black people couldn't talk and, therefore, if we were going to work as speech language pathologists we needed to receive therapy ourselves." See Tr.

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[4] Gilleylen identified each perpetrator; none was offered in rebuttal.

2709, 2717-19.

Ms. Lydia Spragin (1979-93) testified that "the policy [sic] department at the University of Mississippi offered no support to [black] students. We were being harassed on campus." She testified that she

> got slapped in the face with a confederate flag ["in the middle of the university"]. University Police Department was standing on the corner and people were driving by in red convertibles yelling, 'nigger, nigger,' and they could see that I was being harassed, but they didn't come over to stop it....

See Tr. 2741-42, 2750-51.

Lydia Spragin and John Hawkins (1980-84) testified about a terrifying event after Hawkins, elected to be the first black cheerleader at the university, declined to "carry the rebel flag," a tradition for cheerleaders at

the school. A large, menacing mob of white students gathered initially where they thought the Black Student Union was meeting and then at Hawkins' fraternity. See Tr. 2752-54, 2777-82. Hawkins also testified that he was the victim of a steady stream of other harassment, including death threats. Yet, his requests to the university president and chief of police for protection were unavailing. Tr. 2783-84.

Ms. Stacey Louise Bracey, an undergraduate as of the trial and the elected President of the Black Student Union, testified about the repercussions of the Union's endorsing a slate of white persons who had been "working in the best interests of black students..." for elected positions. "There was a lot of backlash from that. There were threats

to both myself and Phyllis Keyes, who was the President of the BSU at that point in time." Tr. 2789-90, 2793.

There was testimony about racially offensive articles in the university's campus newspaper, the Daily Mississippian. Tr. 1438-39, 2761-62, 2766-68. Some of the Amici were also offended, understandably, when the 1983 Ole Miss yearbook prominently displayed pictures of the Ku Klux Klan marching on the campus. See inside back cover.

That the ill-treatment of Afro-American students had an impact rests on more than statistics and common sense. Pam Gordon, an Afro-American resident of Oxford, the location of Ole Miss, testified that she did not apply to the university, despite her strong credentials, "because of the reputation

of it being unfair to black students...." Two incidents which concerned her were "the near riots" when John Hawkins refused to take the "rebel flag" and "the Klan march." Tr. 2542-44.

The Decision Below is Inconsistent with Controlling Principles Established by this Court

The lower courts' treatment of the evidence concerning harassment at the University of Mississippi, was, as shown below, inconsistent with controlling principles established by this Court. Therefore, the decision below should be reviewed. See Supreme Court Rule 10.1(c).

Relatively few persons of a group will seek out a school setting where they will face, for example, embarrassment, heinous treatment, and grades making more

difficult the attainment of further educational opportunities and employment. In view of the content of the record, admission to the University of Mississippi was not marked by "wholly voluntary and unfettered choice of private individuals." Bazemore v. Friday, 478 U.S. 385, 407 (1986).

Litigation, federal troops, and other advocacy did not earn Afro-American citizens the right merely to walk on the University of Mississippi campus. It earned them the right to a peaceful, nondiscriminatory education, and dignified treatment. See Cooper v. Aaron, 358 U.S. 1 (1958); see also Morgan v. McDonough, 540 F.2d 527, 532-33 & n.6 (1st Cir. 1976), cert. denied, 429 U.S. 1042 (1977).

This Court recently reiterated that

where officials are responsible for the practice of systemic racial discrimination in the delivery of public education, a relevant inquiry is "whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." Board of Education v. Dowell, 59 U.S.L.W. 4061, 40064-65 (Jan. 15, 1991) (footnote omitted). Here, the continuing limited access of black students to the University of Mississippi is one vestige of discrimination. See Ayers v. Allain, 674 F. Supp. at 1551. Moreover, the mistreatment of black citizens enrolled at the university by white staff and students is an obvious example of harm due to "habits of speech, conduct, and attitudes," which are the product of discriminatory state action [Milliken v. Bradley, 433 U.S. 267, 287

(1977)] and must be the subject of particular remedies. Id. at 288.

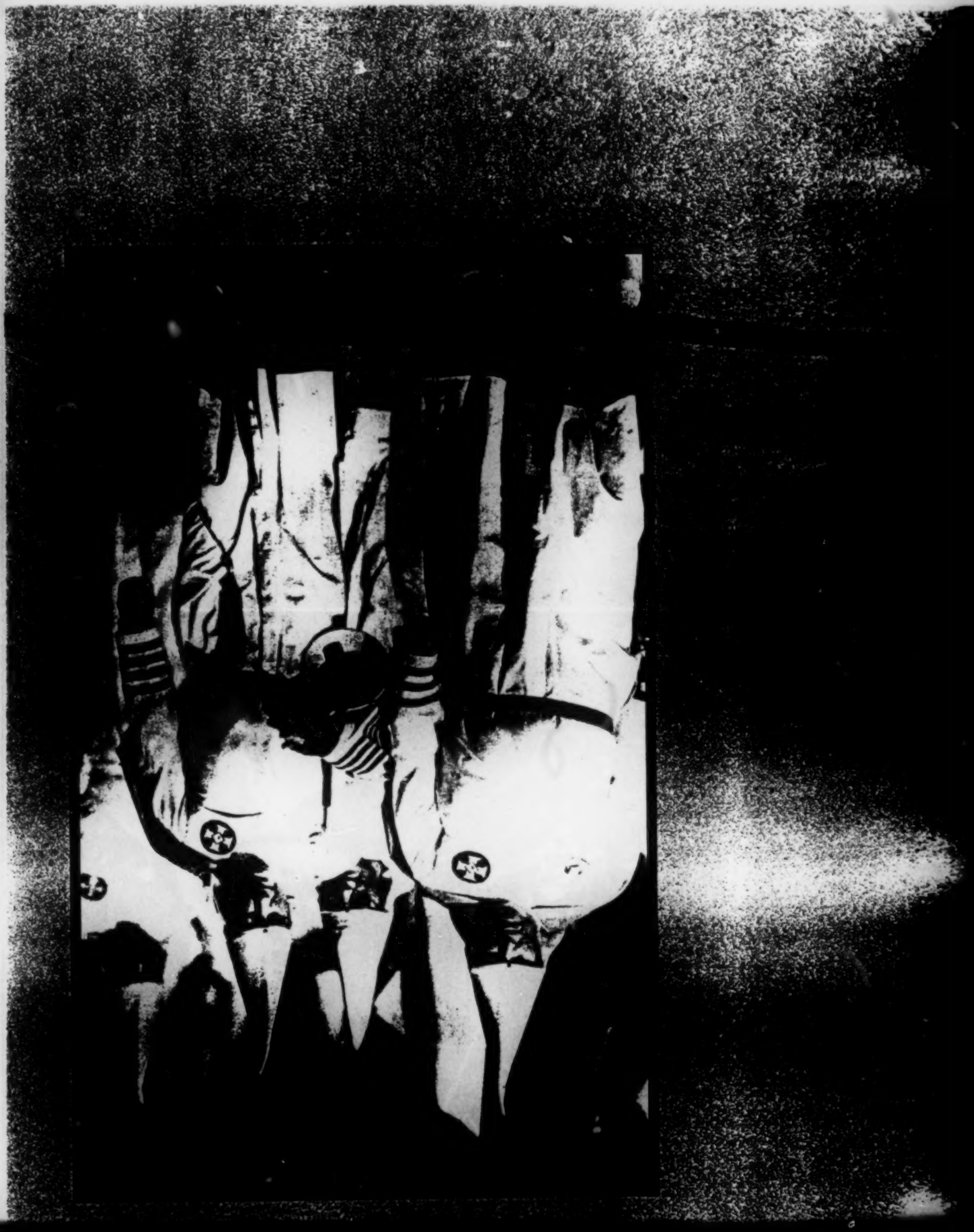
Conclusion

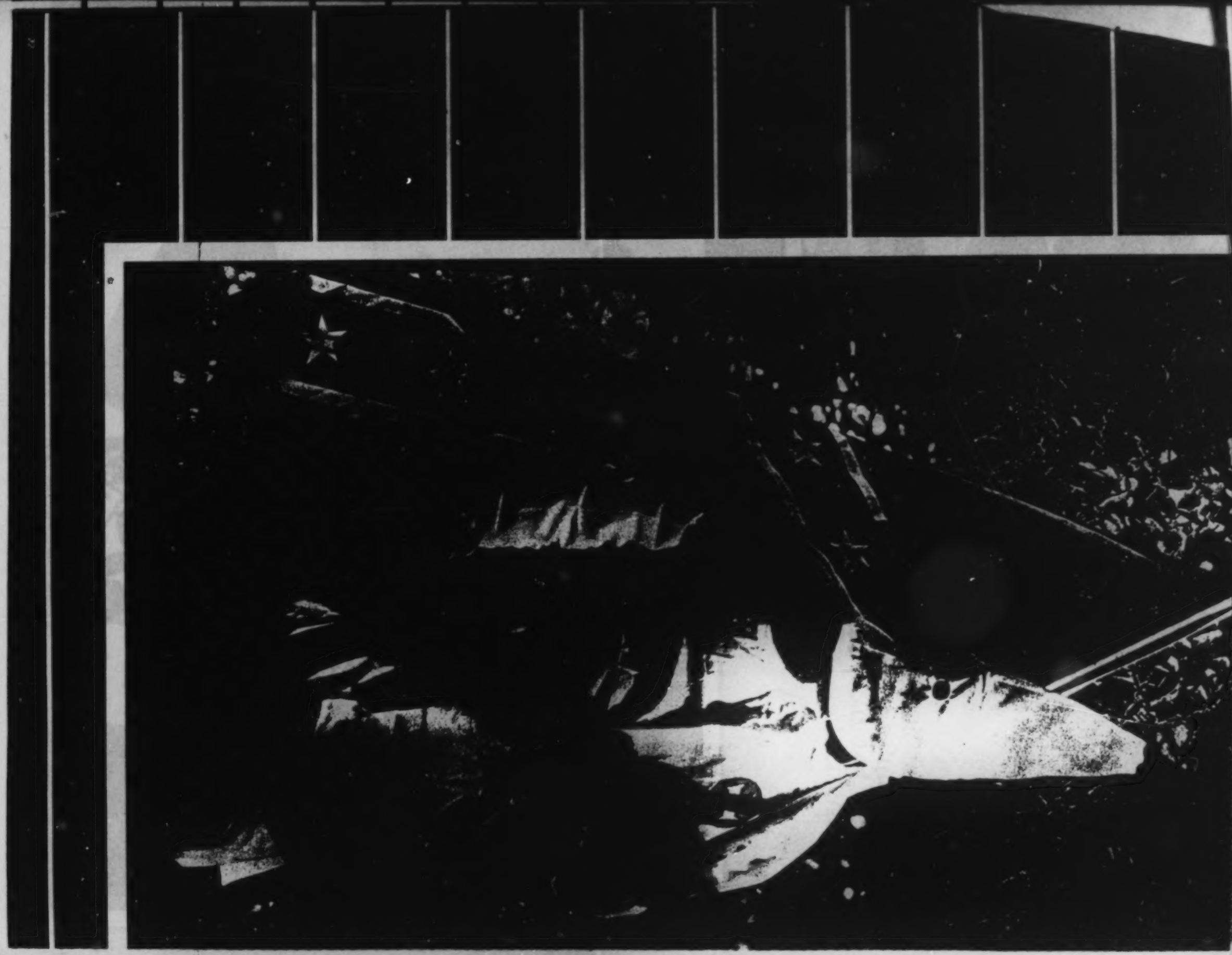
The petitions for review filed by the private plaintiffs and the United States should be granted.

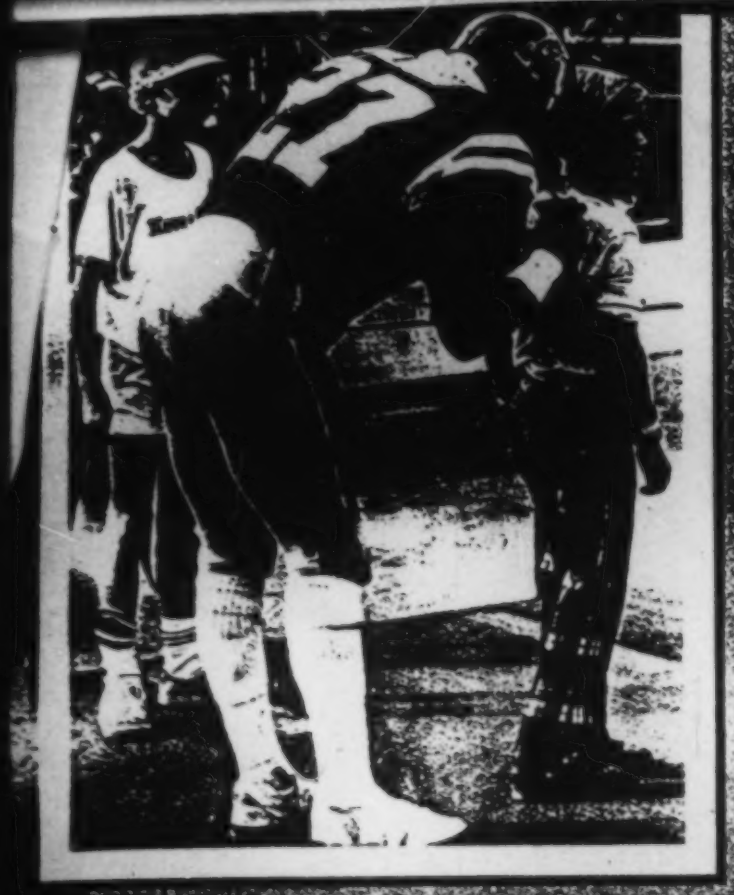
Respectfully submitted,

Willie J. Perkins, Sr.
301 E. Market Street
Greenwood, MS 38930
(601)455-1211
[Counsel of Record]

Gail P. Thompson
P.O. Box 1804
Oxford, MS 38655
(601)234-6103







A story of heroes, of the people and despair of Mississippi, a region whose history has been. Some that the simple human heroes are named Hammerhead and Buford Michael and Carlos, Eric and Lucinia, and that many human problems remain to be solved.

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